XLHC—78

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

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मामला क्रमांक CRA 700 सन् 2001

आदेश पत्रक (पूर्वानुबद्ध)

| आदेश का दिनांक तथा आदेश क्रमांक | हस्ताक्षर सहित आदेश | कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश |
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| | APPELLANT:<br>(In Jail custody) | Madvi Kosa, S/o Madvi Deva Muriya, aged 35 years, Occupation Cultivator, resident of village Doleras, P.S. Kukanar, Distt. Dantewara, Chhattisgarh. |
| | -Versus- | |
| | RESPONDENT: | State of Chhattisgarh, Through P.S. Kukanar, Distt. Dantewara, Bastar, Chhattisgarh. |

(Criminal Appeal under Section 374 (2) of the Cr.P.C.)

**Division Bench: -**
**Hon'ble Shri L.C. Bhadoo &**
**Hon'ble Shri Sunil Kumar Sinha, JJ.**

**2-11-2007:-**

Shri V.P. Gupta, counsel for the appellant.

Shri Akhil Mishra, Panel Lawyer for the State/respondent.

Oral judgment dictated on *Dais*.

**Sunil Kumar Sinha, J.**

This appeal is directed against the judgment of conviction and order of sentence dated 26-6-2001 passed by the Sessions Judge, Bastar in S.T. No.207/2001 whereby, the said Court, after holding the accused/appellant guilty of the offence punishable under Section 302 of the I.P.C., sentenced him to undergo imprisonment for life.

Brief facts are that the deceased namely, Madvi Erre was the wife of appellant Madvi Kosa. Madvi Kosa was ill since few days prior to the

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| | date of the incident which took place on 26-2-2001. He was taken to the house of PW-1 Muchaki Paike, who is the wife of PW-2 Muchaki Deva, who used to practice witchcraft. Since few days back they were sitting in the house of Muchaki Deva for the purpose of witchcraft. On the fateful day at about 4 a.m., Muchaki Paike saw that Madvi Kosa assaulted his wife Madvi Erre with the help of a piece of wood (Khotla). She immediately rushed towards the place and saw injuries on her left ear. Madvi Kosa ran away from the place of occurrence. The report of the incident was lodged by PW-1 Muchaki Paike in the Police Station Kukanar under Ex.P/1. The investigating officer reached to the place of occurrence, prepared inquest on the body of the deceased under Ex.P/2. He seized blood stained soil and plain soil from the place of occurrence under Ex.P/3. A piece of wood was seized from the possession of Madvi Kosa (accused) under Ex.P/5. The body of the deceased was sent for postmortem examination to Chindgarh, Dantewada. The postmortem was conducted by Dr. P.N. Shandilya (PW-5). He prepared his report Ex.P/7. He noticed following injuries on the body of the deceased:-<br><br>➢ One lacerated wound on the back side of left ear, which was also punctured, shape was irregular, size 1" x 0.5" x 0.5".<br><br>Injury was ante mortem in nature and was caused by hard and rough object. On dissection, he found that there was fracture on left side back of ear bone. Brain membrane was also ruptured. All other organs of the body were congested. He gave his opinion that cause of death was shock due to heavy blood loss and brain haemorrhage and fracture of left side of temporal bone. Death was homicidal in nature. | |

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In further investigation, merg intimation was registered under Ex.P/9. Site plan was prepared under Ex.P/11. Seized articles were sent for chemical examination to the Forensic Science Laboratory, Raipur under Ex.P/13, but no report from the said laboratory was produced.

After completion of the usual investigation, charge sheet was filed in the Court of Judicial Magistrate, 1st Class, Sukma, who in turn committed the case to the Court of Sessions where the trial was conducted and the impugned judgment of conviction and order of sentence was passed.

Learned counsel for the accused/appellant has not disputed homicidal death of the deceased. Moreover, it comes in the evidence of PW-1 Muchaki Paike that the husband and wife (deceased) both were sleeping in the Kotha of her house. On 26-2-2001 at about 4 a.m. she saw that the appellant assaulted the deceased with the help of Khotla due to which the deceased received injuries on her head. Blood started coming out. The evidence of PW-1 Muchaki Paike is supported by the evidence of PW-5 Dr. P.N. Shandilya, who conducted the postmortem on the body of the deceased and found above external and internal injuries on her head. He opined that cause of death was shock due to heavy blood loss and brain haemorrhage and fracture of left side of temporal bone. He further opined that death was homicidal in nature. Therefore, it is established that death of the deceased was homicidal in nature.

Learned counsel for the accused/appellant argued that this is a case of single eyewitness. There is discrepancy in the ocular and medical evidence in this case. He submits that the sole eyewitness namely PW-1

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Muchaki Paike has stated that the appellant had given repeated assault on the head of the deceased, whereas in the postmortem report, only one injury was noticed by the doctor. Alternatively, he argued that as per the case of the prosecution, there was some quarrel between the husband and the wife on account of taking of coconut by husband, which was brought for giving to PW-2 Muchaki Deva, who was practicing witchcraft and on account of this only, husband gave single blow on the head of the deceased. Therefore, offence against the accused would not travel beyond Section 304 Part-II of the I.P.C.

On the other hand, learned counsel for the State opposes this argument and supports the judgment of conviction and order of sentence passed by the trial Court.

To appreciate the argument advanced by learned counsel for the accused/appellant, we have carefully perused the record. So far as discrepancy in between ocular and medical evidence is concerned, it has been held by the Supreme Court in the matter of **State of U.P. V. Krishna Gopal and another**[1] and further in **Ramakant Rai V. Madan Rai and others**[2] that "where the eye-witnesses' account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive. Importance and primacy should be given to the orality of the trial process. Eye witnesses' account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence, including medical

[1] (1988) 4 SCC 302
[2] AIR 2004 S.C. 77

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evidence, as the sole touchstone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be creditworthy; consistency with the undisputed facts; the 'credit' of the witnesses; their performance in the witness-box; their power of observation etc. Then the probative value of such evidence becomes eligible to be put into the scale for a cumulative evaluation."

Therefore, it is clear that the eye witness testimony may contain inaccuracies and exaggerations; there may be errors or omissions on account of lapse of memory or poor power of observations or inability to recount and recite accurately. Sometimes, doctors also may not bestow sufficient care while performing examination or preparing records and their opinion may be based on inadequate or incomplete or defective examination or lack of complete knowledge. It is indeed not fair to expect a total correspondence between these two items of evidence. Court must carefully examine the discrepancies and if it is reasonably possible to arrive at the substantial and true version. Court should not throw out the prosecution case on the basis of such discrepancies. Accuracy of medical witnesses and ocular witnesses depends upon several factors. Inconsistency is not sufficient to discredit an eye witness. Sometimes an eye witness may allege a blow or stab etc., but there may not be corresponding injuries. The possibility of weapon not actually striking and not causing injury cannot be ruled out. Eye witness may err in details like direction or the blow etc. Inconsistency regarding such details between the two items of evidence may not be important. There may be discrepancies regarding the weapon or manner of attack. If the eye

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| | witness testimony is clear and convincing, discrepancies cannot matter. Doctor is a witness of both fact and opinion. Medical evidence acts as a check upon testimony of eye witness; it is also independent evidence in so far as it establishes facts e.g., tattooing marks, nature and dimensions of injury etc. Medical evidence is also corroborative of eye witness testimony, in as much as it may show that the injury might have been caused in the manner alleged. Defence could use the medical evidence to show that the injury could not have been caused as alleged and thereby discredit eye witness testimony. However, unless the medical evidence goes so far that it completely rules out all possibility whatsoever of the injuries taking place in the manner alleged by the eye witness, the prosecution version cannot be thrown out on the ground of alleged inconsistency between the two items of evidence. Court has to remember that medical evidence is mainly opinion evidence on which the court could form its own independent conclusion. In case of divergence, the Court must try to reconcile the two; if that is not possible the court has to appreciate the evidence like any other evidence, having regard to reasons and data provided by the Doctor and the cogency or otherwise of eye witness testimony. If eye witnesses are credible and trustworthy, medical opinion suggesting alternative possibility may not be accepted as conclusive. Primacy should be given to oral evidence.<br><br>PW-1 Muchaki Paike has deposed that in the fateful night she along with her husband namely, Deva were sleeping in a room in her house whereas, the appellant and the deceased were sleeping in Varanda like Kotha in the same house. At about 4 a.m. she heard some noise and saw that the appellant was beating his wife with the help of a Khotla (piece of | |

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| | wood). She saw that Khotla blow was given on the head of the deceased. She has further deposed that the accused had given 3 blows on the head of the deceased. In para-3 of her evidence, she has deposed that coconut was brought by them for giving as Bidai (last gift) while leaving the house after the witchcraft. When the wife had gone to fetch the water, coconut was taken by the husband for eating. On this, she said that this has not been brought for your eating and on this count, there was some tension between them. The Court evidence of this witness is supported by the contents of FIR Ex.P/1 which was lodged by her. In the FIR also, there is discrepancy about the story of taking coconut by husband. There is also description about making assault by the accused to the deceased. Though she has been put to the cross-examination on the point that she could not see the place of occurrence from where she was sleeping, but she has denied all this and ultimately no material has been brought on record by the defence on the basis of which it can be said that either her presence on the place of occurrence was doubtful or she is making false allegations against the accused or in fact, she had not witnessed the occurrence. The evidence of this witness is also supported by the evidence of PW-2 Muchaki Deva, who is husband. He has stated that his wife immediately told him that the deceased has been assaulted by her husband and thereafter report was lodged.<br><br>As far as discrepancy in between medical and oral evidence is concerned, on the basis of principle laid down by the Apex Court in the aforesaid cases, primacy has to be given to the ocular evidence and if only one injury is found in the postmortem report of the deceased, that can only not be the ground for disbelieving the testimony of this witness. | |

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Therefore, complicity of the accused in the crime in question is established in this case on the basis of above evidence.

As far as argument regarding offence under Section 304 Part II of the I.P.C. is concerned, the case of the prosecution is that since few days back the appellant and his wife both were residing in the house of PW-1 Muchaki Paike and PW-2 Muchaki Deva for the purposes of witchcraft because the appellant was not feeling well. The deceased had brought her husband for treatment through witchcraft and after some time when the condition of the husband was recovering, they had to go back and coconut was brought for giving as a present, at that time some quarrel took place between the husband and wife regarding taking coconut by the husband and thereafter there was some tension between them. On the fateful day the husband gave a single blow on the head of the deceased, which resulted into fracture of temporal bone, which proved fatal and was cause of death of the deceased. From the facts and circumstances of the case, it appears that on account of petty quarrel without pre-meditation and without any preparation, husband gave a blow on the head of the deceased. Single blow was given by Khotla, therefore, in the facts and circumstances of the case, when there was no background, it cannot be said that there was an intention of the appellant to cause murder of his wife. Either in a heat of passion or for any other reason, he gave single blow on her head with a piece of wood, which was already lying there, therefore, it can be said that even though there was no intention of the appellant but, certainly there was knowledge that his such act may cause death of his wife and in the facts and circumstances of the case, offence

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| | committed by the accused/appellant would not travel beyond Section 304 Part-II of the I.P.C.<br><br>In the result, the appeal is partly allowed. The conviction and sentence awarded to the appellant under Section 302 of the I.P.C. are set aside, instead thereof, he is convicted under Section 304 Part-II of the I.P.C. and sentenced to undergo R.I. for 7 years. As per the judgment of the trial Court, the accused/appellant is in detention since 27-2-2001 till date. The accused/appellant shall be entitled for set off for the above detention period against the sentence imposed upon him.<br><br>**Sd/-**<br>**L.C. Bhadoo**<br>**Judge**<br><br>**Sd/-**<br>**Sunil Kumar Sinha**<br>**Judge** | |